No. 08-958

In The
Supreme Court of the United States

BALLY TOTAL FITNESS CORPORATION,
SANTINO DiBERARDINO AND
JEFFREY PATTERSON,

Petitioners,

v.

CARI BUTCHER,

Respondent.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Ohio
Eighth Appellate District,
County Of Cuyahoga**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, the Supremacy Clause of the United States Constitution, and *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 272, 115 S. Ct. 834 (1995), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006) and *Preston v. Ferrer*, ___ U.S. ___, 128 S. Ct. 978 (2008) preempt the holding in this case, which voided an arbitration award pursuant to Ohio Revised Code § 2711.10(A)?

THE PARTIES AND RULE 29.6 DISCLOSURE

The parties to this proceeding are Petitioners Bally Total Fitness Corporation, Jeffrey Patterson and Santino DiBerardino, and Respondent Cari Butcher.

Bally Total Fitness Corporation's parent company is Bally Total Fitness Holding Corporation. There are no publicly-held companies owning 10% or more of Bally Total Fitness Corporation's stock.

On December 3, 2008 Bally Total Fitness Corporation filed Chapter Eleven proceedings in bankruptcy in jointly administered Case No. 08-14818 (BRL) United States Bankruptcy Court Southern District of New York. On December 22, 2008, that court entered an order authorizing Bally Total Fitness Corporation to employ Littler Mendelson to perform legal services for the debtor as an ordinary course of business professional, thereby authorizing Littler Mendelson to prosecute this appeal.

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Pursuant to Supreme Court Rule 10(c), Petitioners Bally Total Fitness Corporation, Jeffrey Patterson and Santino DiBerardino respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the Cuyahoga County, Ohio Eighth Appellate District Court of Appeals – which was denied review by the Ohio Supreme Court – on the issue of Federal preemption.

OPINIONS BELOW

The *Order Denying Review*, by the Ohio Supreme Court, is set forth in Petitioners' Appendix (Pet. App. F. at App. 42.) *Butcher v. Bally Total Fitness Corporation*, No. 2008-1307 (Supreme Court of Ohio October 29, 2008).

The *Orders Denying Reconsideration* and *Rehearing en banc* and *Petitioner's Motion to Certify a Conflict*, by the Cuyahoga County, Ohio Eighth Appellate District Court of Appeals, are set forth at (Pet. App. C, C-1, and C-2. at App. 18-20.) *Butcher v. Bally Total Fitness Corporation*, No. 90216 (Court of Appeals of Ohio Eighth Appellate District June 10, 2008).

The *Majority Opinion* of the Cuyahoga County, Ohio Eighth Appellate District Court of Appeals is set forth at (Pet. App. A. at App. 1-11.) *Butcher v. Bally Total Fitness Corporation*, No. 90216 (Court of Appeals of Ohio Eighth Appellate District June 10, 2008).

The *Dissenting Opinion* of the Hon. Kenneth A. Rocco, Judge for the Cuyahoga County, Ohio Eighth

Appellate District Court of Appeals, is set forth at (Pet. App. A. at App. 11-13.) *Butcher v. Bally Total Fitness Corporation*, No. 90216 (Court of Appeals of Ohio Eighth Appellate District June 10, 2008).

The Order Granting Petitioner's Motion to File Supplemental Authority is set forth at (Pet. App. D. at App. 21.)

The *Judgment Entry* by the Hon. Janet R. Burnside, Judge for the Court of Common Pleas for Cuyahoga County, Ohio is set forth at (Pet. App. B. at App. 14-16.) *Butcher v. Bally Total Fitness Corporation*, No. 02-458434 (Court of Common Pleas Cuyahoga County, Ohio July 15, 2007).

The trial court orders compelling arbitration in *Butcher v. Bally Total Fitness Corporation*, Case No. 02-458434 Court of Common Pleas Cuyahoga County, Ohio (June 26, 2002) and (July 8, 2002) respectively are set forth at (Pet. App. E-1 and E-2. at App. 40-41.) The Court of Appeals decision affirming the order compelling arbitration in *Butcher v. Bally Total Fitness Corporation*, No. 81593 (Court of Appeals of Ohio Eighth Appellate District April 3, 2003) is set forth at (Pet. App. E. at App. 22-39.)

JURISDICTION

The decision of the Cuyahoga County, Ohio Eighth Appellate District Court of Appeals was final upon the denial of discretionary review by the Ohio

Supreme Court on October 29, 2008. (Pet. App. F. at App. 42.) Therefore, this Petition is timely filed under Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the United States Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. §2. *See Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852 (1984), *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 272, 115 S. Ct. 834 (1995), and *Preston v. Ferrer,* ___ U.S. ___, 128 S. Ct. 978 (2008).

Pursuant to Supreme Court Rule 14.1(e), Petitioners supply the following information:

(i) Date the judgment or order sought to be reviewed was entered: October 29, 2008, by the Supreme Court of Ohio

(ii) Date of any order respecting rehearing/ extension of time: Not applicable to this Petition

(iii) Rule 12.5 considerations: Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction: 28 U.S.C. §1257(a)

(v) Rule 29.4 statement: Not applicable to this Petition

STATUTES AND RULES

28 U.S.C. §1257(a) **State courts, certiorari** provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (Pet. App. G. at App. 43-44.)

Article VI, **Clause 2 – Supreme law** of The United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Pet. App. G. at App. 43.)

The Federal Arbitration Act, 9 U.S.C. §2, states, in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Pet. App. G. at App. 43.)

Ohio Revised Code §2711.10(A), states, in pertinent part:

> In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if: (A) The award was procured by corruption, fraud, or undue means. . . . (Pet. App. G. at App. 44.)

Supreme Court Rules 10(c), 13.1, and 14.1(e) and Ohio Supreme Court Rule 4 for the reporting of opinions are set forth in (Pet. App. G. at App. 45-48.)

STATEMENT OF THE CASE

Respondent Cari Butcher sued her employer Bally Total Fitness Corporation, Bally Area Supervisor Santino DiBerardino, and Bally General Manager Jeffrey Patterson (jointly "Petitioners") for sexual harassment, sex discrimination, intentional infliction

of emotional distress, negligent retention, and retaliatory discharge. (Pet. App. 3.)

Petitioners, pursuant to the Federal Arbitration Act (hereinafter FAA), moved to dismiss or stay the lawsuit pending arbitration – arguing that Butcher signed a contract known as the Employment Dispute Resolution Procedure ("EDRP"), which required her to submit the dispute to final and binding arbitration. (Pet. App. 4, 28.) The Cuyahoga County Court of Common Pleas ordered Butcher to arbitrate her claims (Pet. App. at 40-41), and the Cuyahoga County Court of Appeals affirmed that decision in 2003. In that decision the Court of Appeals invoked *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) for the proposition that the Federal Arbitration Act applied to the EDRP in this case. (Pet. App. 22, 23, 31, 38.)

The matter proceeded to arbitration. (Pet. App. 4, 62-68.) The EDRP provided two alternate methods for selection of the arbitrator:

> [1] **"The parties will confer and attempt to agree on the selection of the Arbitrator.** [2] ***If the parties cannot so agree within sixty (60) calendar days*** after the receipt of the Employee's notice specified in Paragraph 6.1, the Employer shall request a list of proposed arbitrators from the American Arbitration Association ("AAA"). The list shall consist of seven proposed arbitrators with the educational and professional biographies of each. Each proposed arbitrator must reside within the state of the county of

> venue as specified in Paragraph 9.1 and must be a practicing attorney or former judge with experience in employment disputes. . . . *The Arbitrator shall be selected by the Parties alternately striking names from the list.* The Employee strikes first. *The last name remaining on the list shall be the Arbitrator selected to resolve the Dispute(s).*" [Emphasis added] (Pet. App. 74.)

Initially, AAA sent the parties a list of 31 potential arbitrators. (Pet. App. 14-15, 78, 80, 85-86.) After reviewing an accurately compiled set of resumes, Petitioners' counsel suggested the parties select Robert Stein to be their arbitrator. (Pet. App. 15.) Respondent's counsel agreed to the selection of Robert Stein, and the parties then asked AAA to appoint Mr. Stein as their arbitrator. (Pet. App. 89.) Therefore, the parties did not reach the next step of the selection process, that is, the Employer requesting a list from AAA, which then would supply the parties with seven proposed names.

The matter proceeded to arbitration before Mr. Stein. (Pet. App. 4, 62-67.) Stein made various evidentiary rulings and, on June 22, 2006, he issued an award in Petitioners' favor because Butcher did not prove her claims by a preponderance of the evidence. (Pet. App. 4-5, 62-67.) In the award, Stein also noted the basis for his arbitral authority – "That he 'had been designated in accordance with the . . . employment agreement entered into by the parties' " – and there was no indication Butcher ever challenged

Arbitrator Stein's authority or appointment during the arbitration process. (Pet. App. 62-63.)

Following Mr. Stein's award, Butcher filed a motion to vacate the award – "on the grounds that the award was procured by corruption, fraud or undue means." (Pet. App. 14.) For the first time, Butcher challenged Stein's authority and his appointment as arbitrator. (Pet. App. 62-63.) However, the Cuyahoga County, Ohio Court of Common Pleas did not find any corruption, fraud, or undue means. (Pet. App. 14-16.) Instead, the Court found a breach of the arbitration agreement because "the parties bargained for an arbitrator they did not receive." (Pet. App. 16.) More specifically, the Court determined (Pet. App. 14-16):

- AAA sent a correct set of resumes to Petitioners, but a mis-compiled set of resumes – with Stein's resume and another arbitrator's resume "scrambled" – to Butcher;
- Butcher's counsel agreed to Stein's selection as the arbitrator without realizing Stein was not an attorney; and most relevant to this Petition;
- The Court *interpreted the arbitration agreement* and concluded "the list generated by the AAA did not comply with paragraph 8.2's requirements for seven proposed arbitrators who were practicing attorneys or former judges. . . . "

The Court granted Butcher's motion to vacate the arbitration award sought on the basis of "corruption, fraud or undue means," even though – in the Court's own analysis – this was nothing more than a unilateral miscommunication *by AAA* which merely resulted in a breach of the arbitration agreement. (Pet. App. 14-16.)

Petitioners appealed. (Pet. App. 3.) Because the Court of Common Pleas' *Judgment Entry* was based on its *own interpretation* of the arbitration agreement – and not based on fraud, corruption or undue means – Petitioners challenged the Court's subject matter jurisdiction to usurp the arbitrator's authority and interpret the parties' arbitration agreement. According to Section 1.6 of the EDRP:

> "Any Dispute concerning the formation, applicability, interpretation, or enforceability of this EDRP, including any claim that all or any part of this EDRP is void or voidable, shall be resolved hereunder, *and not by any federal, state or local court or agency,* except that either party may initiate a legal action in state or federal court to compel the parties to resolve any Disputes pursuant to the EDRP. . . . " [Emphasis added] (Pet. App. 72.)

Petitioners specifically cited to the Cuyahoga County Court of Appeals this Court's decision – in *Preston v. Ferrer*, ___ U.S. ___, 128 S. Ct. 978 (2008) – for the proposition that the FAA deprives state courts of jurisdiction to interpret the parties' agreement or to usurp the arbitrator's exclusive authority

to interpret that agreement. *Petitioners' Motion for Leave to File Supplemental Authority (and Brief in Support),* which was granted *before* the Court of Appeals reached its decision. (Pet. App. 21, 49-51.) Nonetheless, the appellate court did not address the FAA preemption issue. (Pet. App. 1-13.)[1]

Petitioners again raised the Courts' lack of subject matter jurisdiction under the FAA in their *Memorandum in Support of Jurisdiction to the Ohio Supreme Court.* (Pet. App. 52, 60.) However, the Ohio Supreme Court declined discretionary review without opinion. (Pet. App. 42.)

Absent a writ of certiorari, Petitioners' federally-guaranteed right to have an arbitrator interpret and enforce the EDRP will be eviscerated. Moreover, the Ohio Courts' decisions set dangerous precedents which (1) jeopardize the Federal arbitration system

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[1] Before the trial court, Plaintiff Butcher only argued that the arbitration decision should be vacated because it was allegedly procured by "corruption, fraud, or undue means." Accordingly, Petitioner addressed that argument before the trial court. The trial court, however, decided upon a completely different basis by interpreting the arbitration agreement as noted above. Accordingly, Petitioner then addressed in the Court of Appeals and the Supreme Court the trial judge's lack of authority to interpret the agreement in usurpation of the sole province of the arbitrator as required by the Federal Arbitration Act, the Supremacy Clause of the Constitution, and U.S. Supreme Court authority.

and (2) allow state courts to knowingly violate the Supremacy Clause of the United States Constitution.

REASONS FOR GRANTING CERTIORARI

This Case Warrants Review Under Supreme Court Rule 10(c) Because the Decision of the Appellate Court Left Standing by the Ohio Supreme Court Directly Conflicts With the Supremacy Clause of the U.S. Constitution, the Federal Arbitration Act, and U.S. Supreme Court Cases Which Hold That Courts May Not Usurp the Role of Arbitrators in Interpreting Contractual Provisions Specifically Reserved for Arbitrators' Exclusive Jurisdiction. The Decisions of the Ohio Courts Will Improperly Engulf State and Federal Courts in Deciding Thousands of Disputes Which Are Exclusively in the Realm of Arbitrators, and Will Frustrate the Expeditious Resolution of Nationwide Disputes That Arbitration Is Designed to Effect.

Since the Court of Appeals decision is final and review was denied by the Ohio Supreme Court, Ohio precedent now allows its courts to interpret contractual provisions specifically reserved for an arbitrator's exclusive jurisdiction – in direct contravention of the Federal Arbitration Act and this Court's decisions in *Preston*, *supra*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006), and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 115 S. Ct. 834 (1995). *Also see Pacificare Health*

Systems, Inc. v. Book, 538 U.S. 401, 405-07 (2003) (even if an arbitrator's interpretation of the parties' agreement may run afoul of the law, the arbitrator – and not the courts – must be given the first opportunity to interpret the agreement.) It also establishes a dangerous precedent of allowing state courts to avoid controlling decisions of the United States Supreme Court in derogation of the Supremacy Clause of the Constitution.

Bally Total Fitness Corporation is engaged in interstate commerce, and the EDRP is expressly governed by the Federal Arbitration Act. (Pet. App. 31, 72, 76-77.) Nevertheless, the Ohio Courts' decisions have established that Ohio Courts – rather than arbitrators – have authority to interpret contractual language.[2] As a result, the Federal Arbitration Act, the Supremacy Clause, and this Court's decisions enforcing the FAA's preemptive effect over conflicting state authorities are being violated in Ohio. In Ohio, the appellate court's decision is a citable precedent, and therefore it can be used by other Ohio courts to thwart arbitration agreements, like the one at issue here, that affect interstate commerce under the FAA. *See* Ohio Supreme Court Rule 4(A) for The Reporting of Opinions. (Pet. App. G. at App. 47-48.)

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[2] Because Mr. Stein's qualifications under §8.2 of the EDRP were never raised before Stein and the Ohio Courts refused to remand the matter to Stein, Mr. Stein never had an opportunity to interpret those provisions of the agreement.

Nothing in *Preston, Buckeye Check Cashing,* or *Allied-Bruce Terminix Cos.* supports the Court of Appeals decision that Ohio courts – *rather than arbitrators* – have the jurisdiction to interpret contractual provisions. Nothing in those cases eviscerates the Federal Arbitration Act's preemption of contrary state law provisions. Nothing in those cases authorizes a party to simply wait until *after the arbitration* and *then ask the courts to interpret a contractual provision the arbitrator was denied any opportunity to interpret.* Finally, nothing in those cases allows state courts to disregard the Supremacy Clause of the Constitution.

Accordingly, the Ohio Courts' decisions cannot stand. Those decisions, which vacated Arbitrator Stein's award pursuant to Ohio Revised Code §2711.10(A), directly conflict with *Preston*, where this Court held: When parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA. . . . "That national policy . . . 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'" *Preston*, 128 S. Ct. at 983, 987 and *citing Southland Corp. v. Keating*, 465 U.S. 1, 10, 16, 104 S. Ct. 852 (1984) (state laws which void arbitration provisions are preempted by the Federal Arbitration Act) and *Allied-Bruce Terminix Cos.*, 513 U.S. 265, 272 ("the FAA's displacement of conflicting state law is 'now well-established.'") Nevertheless,

when presented with direct citations to *Preston* and this Court's directive that questions of contractual interpretation are reserved for the arbitrator, the Ohio Courts disregarded the FAA and this Court's precedent.

This Petition involves a matter of great importance to every party subject to an FAA-controlled arbitration agreement in the State of Ohio. Furthermore, it involves a matter fundamental to every United States citizen – the right to have courts uphold the Constitution's Supremacy Clause. Moreover, the protracted procedural history of this case over almost seven years in which Respondent has repeatedly sought to avoid going to arbitration in the first place, and then after the fact to avoid the decision of the arbitrator, illustrates the compelling reasons why this Court should review this case to further promote resolution of nationwide disputes by arbitrators without involving courts in these matters.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals of Ohio Eighth Appellate District, County of Cuyahoga and the Ohio Supreme Court.

Respectfully submitted,

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APPENDIX A

OPINION OF THE CUYAHOGA COUNTY, OHIO COURT OF APPEALS AND DISSENTING OPINION

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90216

CARI BUTCHER

PLAINTIFF-APPELLEE

vs.

BALLY'S TOTAL FITNESS CORP., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

(Filed Jun. 10, 2008)

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-458434

BEFORE: Dyke, J., Gallagher, P.J., and Rocco, J.

RELEASED: May 22, 2008

JOURNALIZED: JUN 10 2008

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the

journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

Defendants Bally's Total Fitness Corp. and several of its employees appeal from the judgment of the trial court that vacated an arbitration award entered in favor of Bally's in plaintiff, Cari Butcher's action for sexual harassment and other claims. For the reasons set forth below, we affirm.

On January 8, 2002, Butcher filed this action against Bally's Total Fitness Corp., Bally's Total Fitness of Cleveland, Inc., Bally's area supervisor Santino Bernadino and general manager Jeffrey Patterson (collectively referred to as "Bally's"). Butcher alleged that she was hired as a receptionist at the Brook Park location in August 2000 and was repeatedly subject to unwelcome sexual harassment from Patterson, which created a hostile and abusive environment. She further alleged that, following her objections to Bernadino, she was moved to another Bally's facility where she experienced further sexual harassment before being discharged from her job in February 2001. Butcher set forth claims for sexual harassment (including remarks and physical conduct), sexual discrimination, hostile work environment, respondeat superior, intentional infliction of emotional distress, negligent retention of incompetent employees, and retaliatory discharge.

Defendants moved to dismiss or stay the matter pending arbitration, arguing that Butcher had signed an Employment Dispute Resolution Procedure which required her to submit the dispute to final and binding arbitration. In opposition, Butcher asserted that she had no bargaining power and was coerced into signing the document, the agreement was not explained to her and was hastily presented before the start of her shift on her first day of employment, and is unconscionable. The trial court subsequently referred the matter to arbitration. Butcher appealed to this court, which affirmed. See *Butcher v. Bally Total Fitness Corp.*, Cuyahoga App. No. 81593, 2003-Ohio-1734.

The matter proceeded to arbitration before Robert Stein. Stein made various evidentiary rulings. In an award dated June 22, 2006, Stein outlined Butcher's testimony concerning various incidents of sexual harassment at the Brook Park facility, her transfer to the Beachwood facility and her experience of harassment there, and the circumstances surrounding her termination. He also outlined Bally's investigation and discipline of some employees. Stein then analyzed the claims for relief in light of United States Supreme Court precedent and other cases. He then concluded that Butcher did not prove her claims by a preponderance of the evidence and noted that Butcher failed to "provide a preponderance of first-hand corroborative testimony from unbiased and disinterested witnesses, who had direct knowledge of

the disputed events and verified or supported her claims."

On September 20, 2006, Butcher filed a motion to vacate the arbitrator's award in which she informed the court that she had learned that Stein is not a practicing attorney or former judge and is therefore not competent to arbitrate the matter under Section 8.2 of the Employment Dispute Resolution Procedure, which provides in relevant part as follows:

"The parties will confer and attempt to agree on the selection of the Arbitrator. If the parties cannot so agree within sixty (60) calendar days after the receipt of the Employee's notice * * * the Employer shall request a list of proposed arbitrators from the educational and professional biographies of each. Each proposed arbitrator must reside within the state of the county of venue * * * **and must be a practicing attorney or former judge with experience in employment disputes.** * * * " (Emphasis added.)[1]

Butcher further asserted that Stein misrepresented that he was qualified to serve as an arbitrator and that the copy of Stein's resume, which her counsel received from the American Arbitration Association (hereafter "AAA"), actually listed the qualifications of Attorney Cynthia Stanley on the

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[1] We note that the Local Rules of Cuyahoga County require arbitrators to be attorneys at law. Per plaintiff's exhibits, the AAA requires that an arbitrator "shall be experienced in the field of employment law."

back page. In addition, Butcher asserted that various correspondence sent by the AAA to the parties and to Stein furthered the incorrect impression that Stein is an attorney and that Stein did not correct this misinformation.

On June 14, 2007, the trial court held an evidentiary hearing on the matter. Counsel for Butcher testified that the AAA sent the parties a list of potential arbitrators. Counsel for Bally's recommended that they select Stein because he believed that Stein was fair and competent. At no point did he advise Butcher's counsel that Stein was not an attorney,. however, and Stein was subsequently selected. Counsel for Butcher later received a facsimile transmission from the AAA in which Stein disclosed a conflict of interest and advised the parties that "Mr. Duvin [had once been] his opposing counsel." On September 11, 2003, in an effort to select dates for the arbitration, the AAA sent another facsimile to the parties and to Stein, which again falsely indicated that Stein was a practicing attorney. Two days later, the AAA sent another facsimile transmission in which it corrected the hourly rate for Stein. At no point did Stein advise the parties that he was not an attorney. Later, in delivering the award, Stein noted that he "had been designated in accordance with the * * * employment agreement entered into by the parties." Based upon Stein's pre-hearing rulings and portions of the award, counsel for Butcher became suspicious of Stein's credentials and later learned that he was not an attorney. Butcher's counsel also introduced an e-mail

from Bally's counsel which demonstrated that Bally's counsel knew that Stein was not an attorney.

Counsel for Butcher conceded however, that the initial list of potential arbitrators did not identify Stein as "Esq.," and that he did not specifically inquire as to whether Stein was a practicing attorney. A former co-counsel also testified that they wanted the arbitrator to be an attorney in light of the complexities of employment discrimination law and that she never suspected that Stein was not an attorney. She also stated that neither Stein nor Bally's counsel ever corrected the misunderstanding which had been created.

Counsel for Bally's testified that he did not specifically know that the Employment Dispute Resolution Procedure required the arbitrator to be a practicing attorney or former judge. He maintained that section 8.2 permits the arbitrator to be a practicing attorney or former judge or, in the alternative, someone such as Stein who is on a list compiled by the AAA.

In a written judgment entry, the trial court vacated Stein's award. The trial court noted that the resumes of potential arbitrators, which was supplied to Butcher's counsel from the AAA, was "scrambled" with the resume from attorney Cynthia Stanley, and therefore incorrectly indicated that he was an attorney. Although counsel for Bally's knew that Stein was not an attorney, Butcher's counsel was unaware of this fact until after the arbitration.

Bally's now appeals and assigns four errors for our review. Bally's maintains that the trial court exceeded its powers of review pursuant to R.C. 2711.10(A), that Butcher waived the right to object to Stein's qualifications, that the trial court made an error of fact in determining that Stein had to be a practicing attorney and that the trial court erred as a matter of law in concluding that the arbitrator is required to be a practicing attorney.

It is well-settled that the jurisdiction of courts in the area of arbitration is limited. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 551 N.E.2d 186.

Pursuant to R.C. 2711.10, a trial court may vacate an arbitration award where:

"(A) The award was procured by corruption, fraud, or undue means.

"(B) Evident partiality or corruption on the part of the arbitrators, or any of them.

"(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

"(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. * * * "

Under this statute, a trial court will grant relief from an adverse arbitration award only when the arbitrators were corrupt or committed gross procedural improprieties described in R.C. 2711.10. See *Schiffman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, Cuyahoga App. No. 86723, 2006-Ohio-2473, citing *Cleveland v. Assn. of Cleveland Firefighters* (1984), 20 Ohio App.3d 249, 253, 485 N.E.2d 792; *Huffman v. Valletto* (1984), 15 Ohio App.3d 61, 63, 472 N.E.2d 740.

The standard of review on appeal is whether the trial court erred as a matter of law in rendering its decision. *Cuyahoga Metro. Hous. Auth. v. SEIU Local 47*, Cuyahoga App. No. 88893, 2007-Ohio-4292, citing *Dayton v. Internatl. Assn. of Firefighters, Local No. 136,* Montgomery App. No. 21681, 2007-Ohio-1337; *Union Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112* (2001), 146 Ohio App.3d 456, 459, 2001-Ohio-8674, 766 N.E.2d 1027, citing *McFaul v. UAW Region 2* (1998), 130 Ohio App.3d 111, 115, 719 N.E.2d 632.

In this matter, we cannot conclude that the trial court erred as a matter of law in vacating the arbitration award. From the undisputed facts, a gross procedural error occurred in that plaintiff's counsel received erroneous information which identified Stein as a practicing attorney and relied upon this erroneous information, as well as Bally's counsel's recommendation in selecting him to arbitrate this matter. The trial court also determined that Bally's counsel "had experience with this individual and knew he

wasn't an attorney." Neither Stein nor Bally's counsel corrected any of the erroneous statements which caused plaintiff's incorrect impression. Moreover, under the parties' agreement, the arbitrator was required to be a practicing attorney or a former judge, and because the decision at issue involved multiple complex and detailed legal analyses, as well as evidentiary rulings, Stein does not have the necessary education or credentials to render a mutual, final, and definite award. The trial court did not err as a matter of law and acted within the parameters set forth in R.C. 2711.10 in vacating the award because, at minimum, the arbitrator exceeded his powers, and so imperfectly executed them that a mutual, final, and definite award was not rendered.

As to the issue of waiver, we note that a waiver is an intentional relinquishment or abandonment of a known right or privilege. *Rocky River v. Glodick,* Cuyahoga App. No. 89302, 2007-Ohio-5705. In this matter, there was absolutely no evidence that plaintiff's counsel knew prior to the arbitration that Stein was not an attorney, and to the contrary, numerous documents suggested or stated that Stein was a practicing attorney. In addition, there was no evidence that plaintiff elected to have this matter determined by a layperson. The claim of waiver was therefore properly rejected by the trial court.

The assignments of error are without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ Ann Dyke
ANN DYKE, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS.
KENNETH A. ROCCO, J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION)

KENNETH A. ROCCO, J., DISSENTING:

I would hold that the common pleas court erred by finding the arbitration award was obtained by corruption, fraud or undue means. The court's factual findings do not support the conclusion that any malice, fraud or corruption induced plaintiff's mistaken belief that the arbitrator was an attorney when he was not. Accordingly, I dissent.

R.C. 2711.10(A) allows the common pleas court to vacate an arbitration award if it determines that the award was obtained by corruption, fraud or undue means. The common pleas court limited its analysis to this provision. Our review should be limited to the grounds discussed by the common pleas court. See

Citigroup Global Markets, Inc. v. Masek, Trumbull App. No. 2006-T-0052, 2007-Ohio-2301, ¶25.

None of the common pleas court's factual findings support the proposition that the arbitration award was obtained by fraud. Fraud generally requires a misrepresentation of a material fact, knowingly made, with the intent to deceive, upon which the other party reasonably relies, to his detriment. See, e.g., *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55. Plaintiff's counsel received and relied upon a resume which belonged to another arbitrator to identify Stein as a practicing attorney. There is no indication that the American Arbitration Association, Stein or opposing counsel intentionally jumbled the arbitrators' resumes, knowing that it would mislead plaintiff's counsel. Moreover, I find it difficult to conclude that counsel reasonably relied upon the jumbled resumes to reach the conclusion that Stein was an attorney. The resume page on which counsel supposedly relied on its face was identified as belonging to "Cynthia Stanley, Esq." Furthermore, Stein was the only person on the list of arbitrators who did not have the designation "Esq." after his name. Based upon the facts it found, the common pleas court could not have concluded that the arbitration award was obtained by fraud.

The court also could not have concluded that the award was obtained by "undue means." Undue means requires proof of malice. *Bennett v. Sunnywood Land*

Dev. Inc., Medina App. No. 06CA0089-M, 2007-Ohio-2154, ¶62. There is no evidence that the resumes were jumbled intentionally, much less maliciously.

There is no evidence of any corruption, either. While this ground for vacating an arbitration award has not been developed in the case law, corruption is generally defined as dishonesty or a lack of integrity. Again, there is no evidence that anyone intentionally misled plaintiff's counsel with respect to Mr. Stein's qualifications.

I am not unsympathetic to plaintiff's argument that she selected Mr. Stein on the mistaken belief that he was an attorney when he was not. However, the grounds for vacating an arbitration award are extremely limited and do not include parties' mistakes as to the arbitrator's qualifications. Therefore, I would reverse the common pleas court's decision and remand with instructions to deny plaintiff's motion to vacate the award.

APPENDIX B

JUDGMENT ENTRY BY HON. JANET R. BURNSIDE, JUDGE, COURT OF COMMON PLEAS FOR CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	IN THE COURT OF
	) SS:	COMMON PLEAS
CUYAHOGA COUNTY	)	CASE NO. CV 02-458434

CARI BUTCHER	)	
Plaintiff	)	
vs.	)	**JUDGMENT ENTRY**
BALLY TOTAL FITNESS CORPORATION, *etal*	)	(Filed Jul. 11, 2007)
Defendants	)	

JANET R. BURNSIDE, JUDGE:

The motion to vacate arbitration award is granted under R.C. §2711.10 on the grounds that the award was procured by corruption, fraud or undue means.

The hearing held on the motion yielded no evidence contradicting these facts: the parties did not agree on their own to an arbitrator and therefore the procedure under paragraph 8.2 of the Defendant Employer's Employment Despite Resolution Procedure ("EDRP") was engaged; the Employer requested a list of proposed arbitrators from the American Arbitration Association ("AAA"); the list generated by

the AAA did not comply with paragraph 8.2's requirements for seven proposed arbitrators who were practicing attorneys or former judges with employment disputes experience living in the state containing the county where the dispute was located; the list contained some individuals who were non-attorneys and individuals residing outside Ohio; the résumés of the proposed arbitrators when supplied by AAA to the Employee's counsel had the first and second pages of the arbitrators' résumés scrambled with a proposed arbitrator "A" being described by the first page of his/her résumé, but by the second page of the résumé of arbitrator "B"; the résumés' mis-compilation was not particularly evident upon cursory examination by an interested participant in the process; the parties came to agree on one Robert G. Stein as the arbitrator and requested him of AAA, Plaintiff's counsel relied upon an incorrect copy of his résumé (as described above); the employer's counsel concedes they received an accurately compiled set of resumes for the proposed arbitrators including Stein; Defendant's counsel did not have to rely on the AAA-supplied Stein resume but Plaintiff's counsel being unacquainted with Stein did have to rely upon the AAA-supplied Stein resume; as a result the chosen arbitrator was not a practicing attorney; Defendant's counsel had experience with this individual and knew he wasn't an attorney, but Plaintiff's counsel had no such experience or knowledge; and Plaintiff's counsel did not learn of the arbitrator's true background until after the arbitration.

The Court concludes that under the above facts the parties bargained for an arbitrator they did not receive. It is no answer to the AAA's failure to properly select proposed arbitrators and its failure to properly compile and deliver the proposed arbitrators' résumés to the participants that in any event, AAA procedures are to be followed when they conflicted with the parties' chosen procedures. That concept carried to its extreme would render private arbitration agreements meaningless documents entitled to no serious enforcement in court. Individuals agreeing to arbitration could not rely upon their arbitration agreements' procedures; they would be compelled to endure whatever procedures AAA imposed on them. In effect the procedural safeguards of arbitration agreements would be meaningless since the AAA's procedures could be substituted for them without recourse. In addition, here we have the problem that the miscommunication of the arbitrators' characteristics was unilateral with one side getting correct information and the other side receiving misleading and incorrect information.

Judgment accordingly.

IT IS SO ORDERED.

/s/ Janet R. Burnside
JANET R. BURNSIDE, JUDGE

July 15, 2007

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APPENDIX C

ORDER DENYING RECONSIDERATION BY THE CUYAHOGA COUNTY, OHIO COURT OF APPEALS

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CARI BUTCHER
Appellee

-vs-

BALLY TOTAL FITNESS CORP., ET AL.
Appellant

COA NO. 90216

LOWER COURT NO. CP CV-458434

COMMON PLEAS COURT

MOTION NO. 409631

Date 06/10/2008

Journal Entry

(Filed Jun. 10, 2008)

MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED.

Presiding Judge
SEAN C. GALLAGHER,
Concurs

Judge KENNETH A. ROCCO,
DISSENTS

/s/ Ann Dyke
Judge ANN DYKE

APPENDIX C-1

ORDER DENYING REHEARING EN BANC

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CARI BUTCHER
Appellee

-vs-

BALLY TOTAL FITNESS CORP., ET AL.
Appellant

COA NO. 90216

LOWER COURT NO. CP CV-458434

COMMON PLEAS COURT

MOTION NO. 409723

Date 06/10/2008

Journal Entry

(Filed Jun. 10, 2008)

MOTION BY APPELLANTS FOR AN EN BANC HEARING IS DENIED.

Presiding Judge
SEAN C. GALLAGHER,
Concurs

Judge KENNETH A. ROCCO,
Concurs

/s/ Ann Dyke
Judge ANN DYKE

APPENDIX C-2

ORDER DENYING MOTION TO CERTIFY A CONFLICT

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CARI BUTCHER
Appellee

-vs-

BALLY TOTAL FITNESS CORP., ET AL.
Appellant

COA NO. 90216

LOWER COURT NO. CP CV-458434

COMMON PLEAS COURT

MOTION NO. 409632

Date 06/10/2008

Journal Entry

(Filed Jun. 10, 2008)

MOTION BY APPELLANT TO CERTIFY A CONFLICT IS DENIED.

Presiding Judge
SEAN C. GALLAGHER,
Concurs

Judge KENNETH A. ROCCO,
Concurs

/s/ Ann Dyke
Judge ANN DYKE

APPENDIX D

ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CARI BUTCHER
Appellee

-vs-

BALLY TOTAL FITNESS CORP., ET AL.
Appellant

COA NO. 90216

LOWER COURT NO. CP CV-458434

COMMON PLEAS COURT

MOTION NO. 406445

Date 03/06/08

Journal Entry

(Filed Mar. 6, 2008)

MOTION BY APPELLANTS FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY IS GRANTED.

Judge
COLLEEN CONWAY
COONEY, Concurs

/s/ James Sweeney
Administrative Judge
JAMES J. SWEENEY

APPENDIX E

COURT OF APPEALS DECISION AFFIRMING ORDER COMPELLING ARBITRATION

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81593

CARI BUTCHER Plaintiff-Appellant vs. BALLY TOTAL FITNESS CORP. ET AL. Defendants-Appellees	JOURNAL ENTRY AND OPINION
DATE OF ANNOUNCEMENT OF DECISION	APRIL 3, 2003
CHARACTER OF PROCEEDINGS	Civil appeal from Common Pleas Court Case No. CV-458434
JUDGMENT	AFFIRMED.
DATE OF JOURNALIZATION	Apr. 14, 2003

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FRANK D. CELEBREZZE, JR., J.:

Appellant, Cari Butcher, appeals the lower court's granting of appellees' alternative motion to compel arbitration and stay proceedings.

Butcher, in her early twenties, recently returned to classes at Cuyahoga Community College (Tri-C) in Parma, Ohio after her child turned the age of one. While attending classes at Tri-C, she discovered a job posting for Bally Total Fitness Corp. ("Bally"). On August 28, 2000, Butcher applied for a receptionist position at a Bally in Brook Park, Ohio, where she

completed an application and agreed to a urine test in consideration of employment with Bally.

The employment application contained an acknowledgment with a signature line advising that Bally utilized an employment dispute resolution procedure ("EDRP") to handle work-related disputes. The acknowledgment stated: " * * * the Company has established an alternative dispute resolution procedure to resolve disputes arising out of the employment context, referred to as Bally Employment Resolution Procedure (EDRP). I agree to be bound by the terms of the EDRP as a condition of employment concerning any disputes or claims covered under the EDRP. I understand that I have the right to request and review a copy of the EDRP."

Bally provided an advisement that "if you have any questions regarding this statement, please ask a Company representative before signing." This advisement was located above the signature line and was underlined. An admonition, which was in capital letters and underlined, followed stating, "DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE STATEMENT AND AGREEMENT." Butcher signed the application, but conceded in the hearing before the lower court that she had not read the application in its entirety. She admittedly only read what she deemed necessary to complete the information blanks in the application.

On August 30, 2000, Butcher reported to the Beachwood facility for work and an employment

orientation. Upon her arrival, the manager directed her to sign some employment papers. She was directed to an empty room where a training video was playing to fill out her "new hire" papers. The new hire packet contained information which explained policies, procedures and benefits of Bally.

The new hire packet also contained an Employee Handbook, which clearly explained that in exchange for Bally's consideration of her application and offer of employment, Butcher agreed to resolve all employment-related disputes through Bally's Employment Dispute Resolution Procedure (EDRP). New employees were also provided with a brochure entitled "Alternatives to Litigation." The brochure informs the employee that he/she may ask questions immediately or at a future date about the information provided, and he/she may direct questions to the Human Resources personnel. New employees are informed that they may take the documents home and discuss them with their personal, legal counsel prior to signing.

Bally markets its EDRP by presenting it as a benefit to its employees, providing a cost-effective and speedy resolution to employment-related disputes. The terms of the EDRP bind Bally employees to arbitration in the event of an employment-related dispute, and prevents the filing of lawsuits regarding all covered disputes, including "tort claims; claims for discrimination; and/or claims for violation of any federal, state or other governmental constitution,

statute, ordinance or regulation." Likewise, in exchange for the employee's consent to be bound by the terms of the EDRP, Bally also agrees to arbitrate covered disputes against the employee through the EDRP.

Under the EDRP, the parties are entitled to a neutral arbitrator chosen from a panel provided by the American Arbitration Association (AAA). The parties engage in adequate discovery, including the right to take depositions and exchange documents. The parties may subpoena witnesses and submit post-hearing briefs on all issues. The arbitrator has the authority to enforce discovery rights through sanctions and penalties as provided in the Federal Rules of Civil Procedure. The arbitrator must issue a written award containing findings of fact and conclusions of law. The arbitrator may award any remedies allowed under federal or state anti-discrimination laws. Finally, if the dispute involves federal or state statutory discrimination claims, Bally agrees to pay the entire cost of arbitration except the employee's attorneys' fees and other personal expenses.

In contrast, the EDRP stipulates that the employer may modify the terms of the agreement unilaterally during the course of employment, it limits the time to file a claim to one year for most claims, it is silent pertaining to the cost of arbitration, limits depositions for discovery, allows Bally to litigate specified claims in any forum while limiting the employee's right to do the same and precludes the right to a jury trial.

The Bally representative who conducted the orientation process at the Beachwood location was Paula Tinsley. Ms. Tinsley was unavailable to testify during the hearing in the lower court and is no longer employed by Bally; however, Ira Katz, another witness employed by Bally, advised the trial court of the orientation procedures. He testified that during the orientation, a new hire checklist is completed which highlights the forms issued to the new employee prior to commencement of their employment. Ms. Tinsley had checked off on Butcher's new hire checklist that the EDRP agreement was provided, the employee handbook was provided, and the application for employment was completed. The employee is also asked to sign and date the last page of the handbook, which also explains the EDRP process. Bally retains the last signed page of the handbook in the employee's personnel file, and the employee retains the handbook.

Further, after reading the EDRP itself, the employee is asked to sign a Voluntary Agreement acknowledging he/she has read the EDRP, understands its terms and is bound to resolve all employment-related disputes through the EDRP process.

Butcher signed the Voluntary Agreement, the last page of the employee handbook, and the employment application. These documents were admitted as exhibits pertaining to the binding terms of the EDRP. Incidentally, the EDRP is also posted in the break room at the facility where Butcher worked. Butcher,

however, alleges she never received a copy of the EDRP.

Butcher's employment with Bally ended on February 22, 2001. On January 8, 2002, she filed a complaint in the common pleas court against Bally for prohibited conduct under R.C. 4112.02 et seq. seeking damages and other relief. She alleged claims of sexual harassment, sexual discrimination, hostile work environment, negligent retention in the workplace and related claims. Bally moved to dismiss or compel arbitration and stay proceedings under the Federal Arbitration Act 3 and 4, Ohio Revised Code 2711.02, 2711.03 and 4112.14(C) and Ohio Rules of Civil Procedure 12(B)(1) and (6).

On June 14, 2002, the lower court held an evidentiary hearing on the issue of contract formation. Jacqueline Pethtel, an office manager who is currently a supervisor of the Beachwood office, and Ira Katz, Regional Director of Human Resources in Maryland, testified on behalf of Bally. Butcher testified on her own behalf. The lower court granted Bally's motion to stay, and Butcher appealed to this court on July 26, 2002.

The appellant alleges five assignments of error. Assignments one, three, four and five have a similar factual and legal basis, thus they will be addressed together.

"I. The trial court erred in granting Defendants' Motion to Compel Arbitration and Stay Proceedings,

in finding that the parties had formed a valid contract despite abundant evidence presented that Defendants created unconscionable circumstances surrounding the signing process which showed there was no meeting of minds or voluntary and mutual assent, elements necessary for contract formation."

"III. The trial court erred to the prejudice of Plaintiff-Appellant in enforcing an arbitration agreement despite manifest evidence in the record which indicated the making of the agreement was procedurally unconscionable as it showed adhesion, surprise and lack of meaningful choice and unequal bargaining power between the parties."

"IV. The trial court erred to the prejudice of Plaintiff-Appellant in enforcing an arbitration agreement where evidence showed its terms are substantively unconscionable: The terms of the proposed contract were one-sided and lacked mutuality, they were drafted to benefit the interests of the offeror at the expense of the offeree, and they failed to provide an adequate forum for the redressing of Plaintiff's grievances."

"V. The trial court erred to the prejudice of Plaintiff-Appellant in upholding the arbitration clause, which abridges Plaintiff's Constitutional and statutory rights to which she is entitled as established by the Ohio General Assembly and as a member of a class protected by those policies and statutes, because Plaintiff could not make a knowing, voluntary or intelligent waiver of those rights, by an arbitration

clause which Defendants obfuscated, rather than made clear."

Under R.C. 2711.02(B), " * * * if any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."

R.C. 2711.03 (A) reads in pertinent part:

" * * * The court shall hear the parties, and, upon being satisfied that the making of the agreement of arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement."

The standard of review when the lower court grants a motion to compel arbitration and stay proceedings under R.C. 2711.02 is an abuse of discretion. The standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment. Absent a clear abuse of that discretion, the lower court's decision should not be reversed. *Mobberly v. Hendricks* (1994) 98 Ohio App.3d 839, 845. The Ohio Supreme Court has explained as follows:

"'An abuse of discretion involves far more than a difference in opinion. The term discretion itself involves the idea of choice, of an exercise of will, of a determination, made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'" Id. at 845-846, quoting *Huffman v. Hair Surgeons, Inc.* (1985), 19 Ohio St.3d 83, 87. An abuse of discretion implies more than an error of law or judgment. Rather, abuse of discretion suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

In general, both federal and Ohio courts favor the settlement of disputes through arbitration. See *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498; *Kelm v. Kelm* (1993), 68 Ohio St.3d 26; *Southland v. Keating* (1984), 465 U.S. 1. In *Circuit City Stores v. Adams* (2001), 532 U.S. 105, the Supreme Court held the Federal Arbitration Act applies to arbitration agreements similar in composition to the appellee's EDRP in this case. The Supreme Court has also stated that substantive rights are not forfeited by the enforcement of an arbitration clause, the distinction is merely the type of forum utilized to enforce rights, an

arbitration forum rather than a judicial forum. *Circuit City Stores v. Adams* (2001), 532 U.S. 105, citing *Gilmer v. Interstate/Johnson Lane Corp.* (1991), 500 U.S. 20.

However, the courts will not enforce an arbitration agreement when: 1. the arbitration clause is not applicable to the dispute or issues at hand; or 2. the parties did not agree to the clause. *Ervin v. American Funding Corp.* (Claremont Cty. 1993), 89 Ohio App.3d 519; *Estate of Lola Brewer v. Dowell & Jones, et al.*, Cuyahoga App. No. 80563.

In the instant case, the appellant is asserting alternative arguments: there is no agreement to be bound by the terms of the EDRP, or the agreement is unconscionable, or she did not knowingly waive her right to a judicial forum.

In order for a valid contract to exist, there must be mutual assent, an offer and acceptance of the offer, and consideration. *Nilavar v. Osborne* (1998), 127 Ohio App.3d. An enforceable contract requires these elements to be met; therefore, if there is no meeting of the minds, the contract has not been formed. *McCarthy, Lebit, Crystal & Haiman Co. L.P.A. v. First Union Management* (1993), 87 Ohio App.3d 613.

The appellant asserts there is no meeting of the minds because an employee may not modify the language of the EDRP prior to being hired; therefore, there is unequal or widely disparate bargaining power between the parties. She asserts there was no mutual assent to the terms of the EDRP for the

following reasons: She was unaware the arbitration clause existed and was unfamiliar with the terms of the EDRP; the appellee rushed the orientation process, did not explain the arbitration policy and did not personally hand her a copy of the document which she signed; and the appellee is in a superior bargaining position.

Furthermore, the appellant asserts there was no consideration for the contract. The definition of "consideration" is that a promisor received something of value in exchange for what was given up. If there is no consideration, a promise is illusory and void. *Floss v. Ryan's Family Steakhouses, Inc.* (6th Cir. 2000), 211 F.3d 306.

Generally, the court does not inquire into the adequacy of consideration to support the contract. The court has held in *Morrison v. Circuit City Stores, Inc.* (S.D. Ohio 1999), 70 F.Supp. 2d 815 and *Koveleskie v. SBC Capital Mkts. Inc.* (CA 7 1999), 167 F.3d 361 cert. denied, (1999), 528 U.S. 811, the company's offer of employment is sufficient legal consideration to support the contract.

Next, appellant claims that she was unaware of the arbitration agreement. The Ohio Supreme Court in *ABM Farms, Inc. v. Woods*, 1998), 81 Ohio St.3d 498, rejected the argument that if one fails to read what they have signed, then they are not held to the agreement. In that case, the plaintiff signed an Account Acceptance Form that stated she had received,

read and understood the terms of the Account Agreement booklet describing the terms of the arbitration agreement. The plaintiff later claimed she was unaware of the existence of the arbitration agreement. The court held there was no misrepresentation of facts, only a failure of the defendant to inform the plaintiff of the content of the contract, which it was under no obligation to do. The court explained: "a person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." Id.

The appellant contends that the appellee engaged in deception by strategy by instructing her to appear at work dressed and ready to begin, then, upon her arrival, having her sign eighteen different papers prior to commencement of the job in order to divert her attention away from the arbitration clause. The appellant further claims it was the terms of the contract that were unconscionable when viewing the respective intelligence, experience, age and mental and physical condition of the parties.

The appellant alleges that unconscionability of a contract requires an analysis of both substantive and procedural unconscionability. E. Allen Farnsworth, Contracts 4.28 (3rd ed. 1999). She alleges the procedural analysis focuses on factors relative to the comparative bargaining position of the parties, and the substantive analysis involves the commercial reasonableness of the contract terms.

We disagree that the signing of the contract did not meet the fundamental elements of contract formation. The appellant's action of signing the Voluntary Agreement acknowledges she read and understood the terms of the EDRP. The parties to an agreement should be able to rely on the fact that affixing a signature which acknowledges one has read, understood, and agrees to be bound by the terms of an agreement means what it purports to mean. The parties to a contract must be able to rely on the statements enclosed in the documents asserting the other party understood the terms and conditions of the agreement.

The appellant desires an interpretation of contract law that, although one party acknowledges in writing he/she consents to be bound by the terms of an agreement, the subjective state of mind of the individual should prevail at a later time and date when the terms of the agreement now seem unfavorable to that party's position.

It is clear in this case that the EDRP was introduced to the appellant at several instances prior to her employment and was also displayed in plain sight after she began employment. The appellant claims she was completely oblivious to the existence of the EDRP agreement, but it was posted in the break room at the Beachwood facility. The EDRP agreement was identified in the application for employment, and the EDRP agreement in its entirety was included in the new hire packet with a separate page upon which an acknowledgment form was displayed explaining

the EDRP and requiring a signature of the potential employee to commence work. This was not a clause hidden among numerous pages of forms. The EDRP was presented in the application, the employee handbook and the agreement itself.

The EDRP agreement required a signature of acknowledgment to be bound by its terms. The appellant was given an opportunity to pose questions immediately or take the documents home to have another person review them. The appellant admitted she read only part of the new hire packet, the page to which she must affix a signature, to speed up the orientation process herself. Although there may have been distracting elements present, such as an orientation video playing, there is no evidence that the appellee rushed her to sign the papers and deprived her of any information pertaining to the agreement. The appellant further stated during the orientation that she asked a question of another employee regarding her deductions on the W2 forms.

The court has rejected the formation of contracts where the modification has unilaterally changed existing employment terms and conditions. *Harmon v. Phillip Morris, Inc.* (1997), 120 Ohio App.3d 187. However, because the candidate for employment is free to look elsewhere for employment, and he/she is not obligated to consent to the arbitration agreement, the agreement to arbitrate is not unconscionable. *EEOC v. Frank's Nursery & Crafts, (E. D. Mich. 1997), 966 F.Supp. 500.*

This court acknowledges that the appellant is young, inexperienced and was subjected to inappropriate and provocative displays and gestures in the workplace. However, she was free to find other employment rather than agree to be bound by the terms of the EDRP to address any employment-related disputes. Whether she read the paperwork or disregarded the paperwork, she signed the papers stating she agreed to the terms of the EDRP in order to be hired. The appellant cannot now claim that failing to read the terms of a contract when given the express opportunity to do so amounts to an unconscionable contract.

The crux of appellant's appeal here centers around the unavoidable fact of "the naked truth that she did not read the contract. It drives a stake into the heart of her claim. A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." *ABM Farms*, supra (citation omitted). The above stated assignments of error are without merit.

Appellant's second assignment of error states:

"II. The trial court erred to the prejudice of Plaintiff-Appellant in not allowing questioning and testimony, on grounds of irrelevance, highlighting Defendants' superior financial strength and business experience in relation to Plaintiff, and in not allowing questioning regarding the cost of arbitration, both of

which should have been central to the court's determination on questions of adhesiveness and disparity of bargaining power, as it impacts contract formation issues."

The court has discretion over the relevancy of certain lines of questioning permitted in a hearing. The standard of review is abuse of discretion. The lower court limited the questioning to claims of whether there was a meeting of the minds to arbitrate employment-related disputes by the terms of the EDRP. The court did not allow certain lines of questioning pertaining to indirect knowledge of the witnesses, which is within its discretion. This assignment of error is without merit.

Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ Frank D. Celebrezze, Jr.
FRANK D. CELEBREZZE, JR.
JUDGE

KENNETH A. ROCCO, A.J., AND

MICHAEL J. CORRIGAN, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX E-1

CORRECTED ORDER COMPELLING ARBITRATION

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

CARI BUTCHER Plaintiff BALLY TOTAL FITNESS CORPORRTION [sic] ET AL Defendant	Case No: CV-02-458434 Judge: JANET R BURNSIDE

JOURNAL ENTRY

RECEIVED FOR FILING
07/08/2002 10:07:05
GERALD E. FUERST, CLERK

65 STAY

PURSUANT TO CIV. R. 60(A) THIS CT'S JE FROM 6/26/02 IS CORRECTED TO READ: PLTF'S MOTION IS DENIED. DEFT'S MOTION TO DISMISS OR COMPEL ARB. AND STAY PROCEEDINGS IS GRANTED. ACTION IS STAYED PENDING REINTSTATEMENT [sic] IF REQUIRED UNDER R.C. CHPTR [sic] 2711. FINAL.

/s/ Janet R Burnside
Judge Signature 07/07/2002

APPENDIX E-2

ORDER COMPELLING ARBITRATION

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

CARI BUTCHER Plaintiff BALLY TOTAL FITNESS CORPORRTION [sic] ET AL Defendant	Case No: CV-02-458434 Judge: JANET R BURNSIDE

JOURNAL ENTRY

RECEIVED FOR FILING
06/26/2002 11:00:17
GERALD E. FUERST, CLERK

65 STAY

PLTF'S MOTION TO DISMISS IS DENIED. DEFT'S MOTION TO COMPEL ARBITRATION IS GRANTED. ACTION IS STAYED PENDING RE-INSTATEMENT IF REQUIRED UNDER R.C. CHPTR [sic] 2711. FINAL.

/s/ Janet R Burnside
Judge Signature 06/25/2002

APPENDIX F

ORDER DENYING REVIEW BY THE OHIO SUPREME COURT

The Supreme Court of Ohio

Cari Butcher v. Bally's [sic] Total Fitness Corp. et al.	Case No. 2008-1307 ENTRY (Filed Oct. 29, 2008)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Cuyahoga County Court of Appeals; No. 90216)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX G

STATUTES AND RULES

UNITED STATES CONSTITUTION ARTICLE VI

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

9 USC §2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

28 USC §1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court by writ

of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute in any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

OHIO REVISED CODE §2711.10. Court may vacate award.

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

(A) The award was procured by corruption, fraud, or undue means.

(B) There was evident partiality or corruption on the part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators.

SUPREME COURT RULE 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

* * *

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SUPREME COURT RULE 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort

or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

SUPREME COURT RULE 14. Content of a Petition for a Writ of Certiorari

1(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;

(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and

(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

OHIO SUPREME COURT Reporting Rule 4 "Controlling" and "persuasive" designations based on form of publication abolished; use of opinions

(A) Notwithstanding the prior version of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

(C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:

(1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3(B)(4) of Article IV of the Ohio Constitution;

(2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;

(3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;

(4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

(Adopted effective 5/1/02.)

APPENDIX H

EXCERPTS FROM PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY AND BRIEF IN SUPPORT

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

CARI BUTCHER, Plaintiff-Appellee, v. BALLY TOTAL FITNESS CORPORATION, et al., Defendants-Appellants.	:	CASE NO. CA 07 090216 Lower Court Case No. 458434

DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

(Filed Feb. 29, 2008)

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Attorneys for
Plaintiff-Appellee

As supplemental authority, Defendants-Appellants offer *Preston v. Ferrer* (Feb. 20, 2008), No. 06-1463 – last week's conclusive decision from the United States Supreme Court. In *Preston*, the Supreme Court held that the Federal Arbitration Act (FAA) precludes *state authorities* from exercising jurisdiction over matters contractually-reserved to arbitrators – even if the jurisdiction is based on *state law* (*Id.* at 3, 5, 8):

> We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA. . . . That national policy . . . "appli[es] in state as well as federal courts" and "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements."

The parties' agreement is governed by the FAA (EDRP §21.1): "Any proceeding pursuant to this EDRP shall be an arbitration proceeding subject to

the Federal Arbitration Act, 9 U.S.C. §§1-16, if applicable. . . . " The FAA *is applicable*, because the EDRP is a "contract evidencing a transaction involving commerce", e.g., a contract within the United States Constitution's "Commerce Clause." *See Preston* at 5.

As explained in the original *Brief* and *Reply Brief* the trial court did not have jurisdiction UNDER OHIO LAW to vacate the arbitration *Award* based on a belief the arbitrator had to be an attorney. (EDRP §1.6.) However, even if the trial court had enjoyed such jurisdiction under Ohio law, that law would impermissibly conflict with the FAA, and the trial court's jurisdiction would be displaced under the FAA. *Preston* at 5 *citing Allied-Bruce Terminix Cos. v. Dobson* (1995), 513 U.S. 265, 272.

APPENDIX I

EXCERPTS FROM MEMORANDUM IN SUPPORT OF JURISDICTION TO THE OHIO SUPREME COURT

IN THE SUPREME COURT OF OHIO

CARI BUTCHER, Appellee, v. BALLY TOTAL FITNESS CORPORATION, JEFFREY PATTERSON and SANTINO DiBERARDINO, Appellants.	: Supreme Court Case No.: 08-1307 : On Appeal from The Cuyahoga County Court Of Appeals, Eighth Appellate District : EIGHTH DISTRICT CASE NO.: 07-90216 : CUYAHOGA COUNTY COURT OF COMMON PLEAS CASE NO.: 02-CV-45834

MEMORANDUM IN SUPPORT OF JURISDICTION BY APPELLANTS BALLY TOTAL FITNESS CORPORATION, JEFFREY PATTERSON AND SANTINO DiBERARDINO

(Filed Jul. 7, 2008)

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TABLE OF CONTENTS

I. EXPLANATION WHY THIS IS A CASE OF GREAT PUBLIC AND GENERAL INTEREST.

Plaintiff-Appellee Cari Butcher engaged in arbitration – using an arbitrator mutually-selected by the parties – and, after losing, challenged the arbitrator's qualifications. She succeeded in her challenge below, but only after the reviewing courts committed serious errors.

This case, however, presents far more than just the substantive issues involved. It implicates bedrock principles of judicial process, fundamental fairness and due process. Specifically, it presents the following issues:

1. Can an appellate court presented with an assignment of error challenging subject-matter

jurisdiction disregard that assignment of error and decline to rule on it?

2. Can an appellate court presented with an assignment of error fail to adhere to on-point Supreme Court authority?

3. Can an appellate court make its determination on a basis not raised before the trial court and of which the opposing party was not given notice and a fair opportunity to address?

4. Can an appellate court presented with an assignment of error disregard *stare decisis* and "the law of the case"?

The answer to all these questions is "no", and therefore Supreme Court review is required.

A. THE APPELLATE COURT'S REFUSAL TO ADDRESS SUBJECT MATTER JURISDICTION *REQUIRES* SUPREME COURT REVIEW.

The Court of Appeals' repeated refusal to address Defendants' challenge to subject-matter jurisdiction *literally requires* Supreme Court review.

Defendants' very first assignment of error was that the trial court "exceeded [its] subject-matter jurisdiction." *Assignment of Error No. 1.* Nevertheless, the Court of Appeals failed to decide – or even address – that assignment of error. *May 22, 2008 Journal Entry and Opinion.* Perplexed, Defendants

filed a *Motion for Reconsideration.* In their *Motion*, Defendants pointed-out the Court's oversight. *Motion* at 3-5. Defendants also reminded the Court that Appellate Rule 12 *required it* to resolve the assignment of error and that it would be *reversible error* if the Court did not do so. *Id.* Nevertheless, the Court still refused to decide subject-matter jurisdiction. *June 10, 2008 Journal Entry.*

Because the Court of Appeals refused to address Defendants' assignment of error regarding subject-matter jurisdiction, this Court MUST certify the record. Indeed, it is well-established that an appellate court's failure to decide a non-moot assignment of error – and subject-matter jurisdiction can never be moot[1] – automatically-triggers Supreme Court review. *See, e.g., Smith v. Jaggers* (1973), 33 Ohio St.2d 1, 2 ("Here, the Court of Appeals failed to comply with the provisions of App. R. 12(A), even after being specifically requested to state in writing its reasons for overruling appellant's assignments of error. . . . The motion to certify the record is, therefore, allowed"); *Criss v. Springfield Twp.* (1989), 43 Ohio St.3d 83, 84 *citing Lumbermen's Underwriting Alliance v. American Excelsior Corp.* (1973), 33 Ohio St.2d 37, *State v. Jennings* (1982), 69 Ohio St.2d 389, *Dougherty v. Torrence* (1982), 2 Ohio St.3d 69 and *Danner v.*

---

[1] *See Rosen v. Celebreeze* (2008), 117 Ohio St.3d 241, 249 at ¶49 *quoting Pratts v. Hurley* (2004), 102 Ohio St.3d 81 at ¶11 ("subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case.")

Medical Ctr. Hosp. (1983), 8 Ohio St.3d 19 ("all errors assigned and briefed shall be passed upon by the [appellate] court in writing, stating the reasons. . . . This court has repeatedly reversed and remanded judgments that failed to comply with this part of [Appellate Rule 12]"); *State v. Evans* (2007), 113 Ohio St.3d 100, 105 at ¶¶26-27 ("App. R. 12(A)(1)(c) requires an appellate court to decide each assignment of error and give written reasons. . . . Based on [its failure to do so,] this matter is remanded to the court of appeals"); *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 171 ("the failure to rule on all errors *requires* that the court of appeals' decision be reversed and remanded for compliance with the requirements of App. R. 12(A)") [emphasis added]; *Rothfuss v. Hamilton Masonic Temple Co.* (1971), 27 Ohio St.2d 131, 133-34 ("the Court of Appeals failed to perform its statutory obligation [under the precursor to App. R. 12]. Therefore, this court reverses"); and *Lumbermen's*, 33 Ohio St.2d at 40 ("in light of the more express requirement of App. R. 12(A) that the Court of Appeals must, in writing, pass upon all errors assigned and briefed . . . the judgment of the Court of Appeals is reversed. . . . ") Given that long-standing precedent, Defendants' appeal *must be certified* and the Court of Appeals' *Journal Entry and Opinion must be reversed.*

In fact, the only question is whether the case should be remanded or not. Defendants recognize the general rule is to reverse and remand. Nevertheless, remand would be improper here. First, the reason for

remand in these cases is so an appellate court can comply with Rule 12. As explained in *Rothfuss*, 27 Ohio St.2d at 133-34: "Failure by the Court of Appeals to state its reasons for not passing upon all the assignments of error presented to it precludes this court from determining whether there was any merit to the claims of prejudicial error." However, this cannot be a case where the Court of Appeals simply neglected or forgot to address an assignment of error. The Court of Appeals twice failed without explanation to address Appellants' assignment of error, the second time after being directed specifically to the rule requiring that it do so and alerting it to the possibility of reversal if it failed to do so.

Second, a reversal without remand is warranted because there is a patent and unambiguous question of subject-matter jurisdiction. In those cases, parties can proceed directly to the Supreme Court. *See, e.g., State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St.3d 391, 393 (applying the "patent and unambiguous" standard to writs of prohibition and mandamus because, absent a "patent and unambiguous" lack of jurisdiction, the party "has an adequate remedy on appeal"); *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 98-99 (same).

In this case, the lower courts determined *ex post facto* that Arbitrator Robert Stein, who issued the underlying award, was not qualified to be an arbitrator *under the terms of the parties' agreement.* Yet, that very agreement vested *exclusive jurisdiction* to make

that determination with Arbitrator Stein: "Any Dispute concerning the formation, applicability, **INTERPRETATION**, or enforceability of this [contract] . . . shall be resolved hereunder, **and not by any federal, state or local court or agency,** except . . . to compel the parties to resolve and [sic] Disputes pursuant to [this contract.]" Given that clear contractual language, the lower courts unambiguously lacked jurisdiction to determine whether Stein was a qualified arbitrator. *See Hillsboro v. FOP* (1990), 52 Ohio St.3d 174, 176-77 ("the trial court and a majority of the court of appeals erred in substituting their interpretation of the [contract] for that of the arbitrator [and] exceeded their limited power"); *Preston v. Ferrer* (2008), 128 S.Ct. 978 ("when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA . . . that national policy . . . '[a]pplies in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'") *Preston* applies because the parties agreement is expressly governed by the Federal Arbitration Act.

Because this Court could have decided the jurisdictional issue on a motion for prohibition, it can decide the issue now. The Court therefore should certify the record and reverse without a remand.[2]

---

[2] The Court of Appeals also ignored Defendants' third and fourth assignments of error. According to those assignments of error – *even assuming the courts had jurisdiction to decide whether Stein was qualified under the terms of the parties' agreement* – Stein **was qualified**. The *undisputed evidence* is that Stein was selected by mutual agreement, and arbitrators selected by mutual agreement do not have to be attorneys per the terms of the agreement . . .

APPENDIX J

EXCERPTS FROM ARBITRATION DECISION

AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

In the Matter of the Arbitration between

Re: 53 160 00469 03
Cari Butcher
and
Bally's Total Fitness

Before: Robert G. Stein, Arbitrator

Attorney(s)
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Attorney(s)
for the Respondent:

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AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the personnel manual

or employment agreement entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, FIND and AWARD as follows:

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to a demand for arbitration filed with the American Arbitration Association by

* * *

was subsequently closed upon the parties' submissions of both post-hearing and reply briefs.

No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a determination on the merits.

ISSUES

(1) Did Cari Butcher prove, by a preponderance of the evidence, that Jeff Patterson subjected her to sexual harassment?

(2) Did Cari Butcher prove, by a preponderance of the evidence, that Jeff Patterson was her supervisor?

(3) Did Cari Butcher prove, by a preponderance of the evidence that a tangible job action resulted from Jeff Patterson's sexual harassment?

(4) Did Cari Butcher prove, by a preponderance of the evidence that Bally Total Fitness Corporation retaliated against her?

BACKGROUND

Butcher applied for a job at the Bally facility in Brookpark after she saw an ad on a bulletin board where she attended college classes. She actually began employment after she was interviewed on August 28, 2000 by the Brookpark facility's general manager at that time, Craig Mattingly. Even though she earned only $6 hourly pay initially, the location was convenient based on its proximity to the college where Butcher where [sic] attended classes. She typically worked three weekdays from 5:00 p.m. until the 11:00 p.m. closing and also weekend days as a receptionist at . . .

* * *

> Arbitration is generally not subject to the formal rules of evidence, including the rules excluding hearsay evidence. Among the reasons for this is that, unlike laypersons who comprise a jury, arbitrators are expected to have the experience and expertise to evaluate evidence regardless of its nature and source. Hearsay evidence, therefore, will generally be admitted in arbitrations with due regard for the appropriate weight, if any, to give it . . . This principle is incorporated in Rule 28 of the Labor Arbitration Rules of the American Arbitration Association.

Cambridge East Healthcare Ctr. and SEIU Local 79, 04-1 Lab. Arb. Awards (CCH) P 3757 (Bendixsen 2002) "Arbitrators generally accept hearsay evidence and then give it whatever weight they determine it deserves based on the facts and circumstances of each specific case and its materiality and reliability." *Safetran Sys., Corporation Ky. Div. and R.R. Signalmen, Local 234*, 05-1 Lab. Arb. Awards (CCH) P3103 (Felice 2004).

In the instant matter, the arbitrator specifically finds that the totality of the evidence submitted at hearing and supporting the arguments included in the subsequent briefs failed to establish by a preponderance that Patterson subjected Butcher to sexual harassment of a nature that was sufficiently severe and pervasive as to be recognized as hostile workplace sexual harassment. In making this determination, the arbitrator intends to make it very clear that this decision does not indicate a finding that Patterson did not engage in any offensive behavior while he and Butcher were co-workers at Bally. Rather, the arbitrator's finding is based on Butcher's failure to provide a preponderance of first-hand, corroborative testimony from unbiased and disinterested witnesses, who . . .

* * *

testimony offered was considered to be meritorious, the value of the second person, hearsay testimony offered by Butcher's witnesses supporting Butcher's position was not preponderant. The **hearsay nature**

of even genuinely credible witnesses reduces the weight or probative value that it may be given. *Fort Wayne Cmty Schools.*

Because the Claimant has failed to establish by a preponderance of the evidence that she was subjected to severe and pervasive sexual harassment by Patterson, the issues of whether Patterson was, in fact, her supervisor and whether a tangible job action resulted from his allegedly abusive conduct are moot points. Butcher's first three claims are therefore dismissed. Also, the post-hearing communication/motion from Respondent's counsel dated March 28, 2006 and the subsequent response/objection from Claimant's counsel dated April 3, 2006 regarding the issue of Butcher's transfer or "promotion" to sales as a purported example of Patterson's supervisory authority are deemed to be irrelevant or moot as to the arbitrator's decision here. That motion is therefore denied.

The remaining issue concerns Butcher's claim that Bally unlawfully retaliated against her. The arbitrator here intends to clearly refute the Claimant's assertion (Claimant's reply brief p. 47) that there was a "previous determination" by this arbitrator that "the facts present a prima facie case for retaliation." In the arbitrator's prior decision rendered in . . .

* * *

level of hostile work environment sexual harassment, there is no recognition that Butcher actually engaged in a "protected activity." Also, in the absence of

evidence supporting Butcher's claim that the conduct to which she had been subjected by any or all of the three Bally employees was sufficiently pervasive or severe to merit recognition as hostile work environment sexual harassment, Butcher has failed to establish her claim that she had been constructively discharged.

The four-prong test for establishing a retaliation claim is phrased in the conjunctive, and all four prongs must be satisfied. *Fenton v. HiSAN, Inc.*, No. 98-3322 (6th Cir. 1999). Because Butcher has failed to meet the evidentiary requirement of establishing a retaliation claim by demonstrating a causal link between Butcher's delayed complaints about Kane and Katz's subsequent decision to terminate Butcher, as required in the last prong of the *McDonnell Douglas* test, Bally has no duty "to articulate a legitimate, non-discriminatory or non-retaliatory reason for Butcher's ultimate discharge." In response to the fourth issue identified in this arbitration, the arbitrator finds that Butcher did not prove by a preponderance of the evidence that Bally retaliated against her. Therefore, that last claim by Butcher alleging unlawful retaliation is also dismissed.

AWARD

All of Cari Butcher's claims are denied. All issues are resolved in favor of Respondent Bally Total Fitness and the matter is dismissed.

The administrative fees and expenses of the American Arbitration Association totaling $1,400.00 shall be borne as incurred, and the compensation and expenses of the neutral(s) totaling $34,103.56 shall be borne as incurred.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

6/22/06	/s/ Robert G. Stein
Date	Robert G. Stein

I, Robert G. Stein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

6/22/06	/s/ Robert G. Stein
Date	Robert G. Stein

APPENDIX K

EXCERPTS FROM BALLY EMPLOYMENT RESOLUTION DISPUTE PROCEDURE (EDRP)

BALLY TOTAL FITNESS CORPORATION EMPLOYMENT DISPUTE RESOLUTION PROCEDURE ("EDRP")

BALLY TOTAL FITNESS CORPORATION (hereinafter referred to as "Bally" or the "Employer") considers it in everyone's best interest that all employment-related Disputes be submitted exclusively to final and binding arbitration, pursuant to the Bally EDRP. Bally recognizes that differences may arise between the Employer and the undersigned (the "Employee") arising out of or relating to the Employee's employment with the Employer, or the termination of that employment, and recognizes that resolution of any differences or Disputes is often time consuming and expensive. The Employer and the Employee (collectively hereinafter referred to as the "Parties") agree to submit, for resolution, as provided in this Employment Dispute Resolution Procedure (hereinafter referred to as the "EDRP"), any Covered Disputes, in order to gain the mutual benefit of resolving employment-related disputes in a timely and cost-effective manner. Each Party's promise to resolve Disputes in accordance with the provisions of this EDRP, is consideration for the other Party's like promise. Because the employment relationship can be terminated by either the Employee or the Employer for any reason not otherwise prohibited by law, with or without cause, it is agreed that the Employee's

employment and/or continued employment is additional consideration to Employee for Employee's promises herein. Employees are urged to review this EDRP in detail. Employees are free to seek review of this EDRP by legal counsel.

ARTICLES

1. Covered Disputes (hereinafter referred to as "Dispute(s)")

1.1. With the exceptions set forth below, the parties agree to submit to this EDRP, any and all Disputes between the parties that arise from or relate to the Employee's employment with the Employer, and that concern legally protected rights for which a court or administrative tribunal, in the absence of this EDRP, would be authorized by law to grant relief. By way of example, the type of claims covered by this EDRP include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination and/or harassment, including but not limited to discrimination and/or harassment based on race, color, sex, pregnancy, religion, national origin, ancestry, age, marital status, sexual orientation, mental or physical disability, medical condition, veteran status, or any other protected status; claims for benefits, except as excluded below; and claims for violation of any federal, state, or other

governmental constitution, statute, ordinance or regulation.

1.2. For purposes of this paragraph, the Employer is understood to include each of the Employer's subsidiary and/or affiliated entities, all their owners, stockholders, predecessors, successors, officers, directors, employees and pension or benefit plans and their fiduciaries.

1.3. This EDRP does not apply to the following claims:

1. claims for workers' compensation benefits or compensation;

2. claims for unemployment compensation benefits;

3. unfair labor practice charges before the National Labor Relations Board;

4. claims by the Employer for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, or for unfair labor practices, and unlawful picketing and strikes; and

5. claims based upon an employee pension or other benefit plan, the terms of which contain an arbitration or other non-judicial dispute resolution procedure, unless and until those procedures have been exhausted.

1.4 This EDRP shall apply to any Covered Dispute whether it arises or is asserted during or after termination of the Employee's employment with Employer.

1.5. Retaliation against any Employee for using this EDRP is prohibited, and claims of such retaliation are to be resolved under this EDRP.

1.6. Any Dispute concerning the formation, applicability, interpretation, or enforceability of this EDRP, including any claim that all or any part of this EDRP is void or voidable, shall be resolved hereunder, and not by any federal, state, or local court or agency, except that either party may initiate a legal action in state or federal court to compel the parties to resolve any Disputes pursuant to the EDRP, unless otherwise exempted from the procedures herein.

2. Exclusivity, Exhaustion, Waiver and Binding Effect

2.1. All Disputes shall be presented for resolution pursuant to this EDRP.

2.2. Resolution of any Dispute pursuant to this EDRP is intended to be final and binding on the Parties to the fullest extent permitted by law.

2.3. Even if not found to be final and binding, the Award of the Arbitrator shall be accorded the fullest weight permitted by law.

2.4. The failure of an Employee to initiate this EDRP within the time limits set forth in Article

Four shall be deemed a waiver and release by that Employee of the Employer with respect to any Disputes relative to that Employee, in any forum, unless otherwise expressly agreed to in writing by the president or by a representation of the Employer specifically set forth in Article 6.1.

* * *

7. Timing and Method of Giving Notice

7.1. Service of any notice and/or submission, commencing with notice given pursuant to Article Six, shall be deemed given for the purposes of this EDRP, by depositing the notice in a postage-paid envelope, return receipt requested, in a U.S. Postal Service deposit box regularly maintained for this purpose.

7.2. Delivery shall include delivery by a non-U.S. Postal Service package delivery service which provides a return receipt as proof of delivery, such as Federal Express, or similar overnight delivery services.

7.3. The Employer shall use the address last listed by the Employee with the Employer for income tax withholding in order to give the Employee any notices required hereunder, unless the written notice of Employee required to commence this EDRP pursuant to Paragraph 6.1. specifies a different address for Employer. For all purposes, the Employer's address pursuant to Article Six shall be used.

7.4. The production of an affidavit of service, signed and dated acknowledgment or receipt, or

a signed and dated return receipt, shall be adequate proof to presume delivery.

7.5. Any notice and/or submissions made by any Party pursuant to this EDRP to the Arbitrator shall also be made contemporaneously on the opposing Party. There shall be no communication by or with the Arbitrator by one Party without the participation of all other Parties.

8. The Arbitrator

8.1. Any Dispute will be decided by a single decision maker, called the "Arbitrator."

8.2. The Parties will confer and attempt to agree on the selection of the Arbitrator. If the Parties cannot so agree within sixty (60) calendar days after receipt of the Employee's notice specified in Paragraph 6.1., the Employer shall request a list of proposed arbitrators from the American Arbitration Association ("AAA"). The list shall consist of seven proposed arbitrators with the educational and professional biographies of each. Each proposed arbitrator must reside within the state of the county of venue as specified in Paragraph 9.1. and must be a practicing attorney or former judge with experience in employment disputes. The Employer and Employee may each reject one entire list of proposed arbitrators before beginning the selection process. The Arbitrator shall be selected by the Parties alternately striking names from the list. The Employee strikes first. The last name remaining on the list shall be the Arbitrator selected to resolve the Dispute(s). The Employer and Employee shall make every reasonable effort to complete selection of the Arbitrator within ninety (90) calendar days

after the Employee's notice specified in Paragraph 6.1. is received by the Employer.

* * *

19.2. "Interim earnings," regardless of their source, includes but is not limited to wages; retirement, disability, insurance and other benefits; and, severance and/or other payments received by or to be received by the Employee, except that it does not include unemployment compensation benefits.

19.3. Upon a finding that the Employer has sustained its burden of persuasion on any counterclaim, the Arbitrator may award such relief as may be just and reasonable, including, but not limited to, monetary relief, and the Employer, at its sole discretion, may apply all or any portion of such relief, and/or any Award of sanctions in favor of the Employer pursuant to Article Twenty, as a set-off against any monetary relief awarded to the Employee by the Arbitrator.

19.4. The Parties have a duty to mitigate their damages by all reasonable means, including but not limited to, in the case of the Employee, mitigation by way of seeking other work and making application for unemployment, disability, retirement or, other available benefits. The Arbitrator shall take a Party's failure to mitigate into account in granting relief. Further, the Arbitrator shall consider interim earnings when computing any compensatory damages, front pay or back pay award, and shall reduce any such damages or award in an amount equal to all interim earnings received by Employee.

19.5. Computations of back pay or front pay shall be based upon, in appropriate circumstances, a reasonable estimate of the Employee's gross compensation, including bonuses, car allowances, commission and related cash compensation, but excluding any cash value of any insurance, retirement and/or other fringe benefits.

19.6. The Award of any damages or relief provided for in this EDRP may, at the sole discretion of the Arbitrator, be made in a bifurcated proceeding and/or by supplemental briefing.

20. Sanctions

20.1. The Arbitrator may award either Party its reasonable attorneys' fees and costs, including reasonable expenses associated with production or witnesses or proof, upon a finding that the claim or counterclaim was frivolous or brought solely to harass the Employee, the Employer, or the Employer's personnel.

20.2. The Arbitrator may award either Party its reasonable attorneys' fees and costs reasonably related to any of the following conduct by the other party: a) unreasonable delay, b) failure to comply with the Arbitrator's discovery order, or c) failure to comply with requirements of confidentiality under this EDRP.

21. Arbitration Statute and Non-Violation of Law

21.1. Any proceeding pursuant to this EDRP shall be an arbitration proceeding subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, if applicable, or, otherwise, to the statutory law of the

state of venue, if applicable, or, otherwise, to the common law of the state of venue.

APPENDIX L

JULY 24, 2003 LETTER FROM AAA REGARDING LIST OF ARBITRATORS

[LOGO] American Arbitration Association
Dispute Resolution Services Worldwide

L'Tanya Keith-Robinson
Vice President, Case Management Center

2200 Century Parkway, Suite 300, Atlanta, GA 30345
telephone: 404-325-0101 facsimile: 404-325-8034
internet: http://www.adr.org/

July 24, 2003

VIA U.S. MAIL

Renee Z. Greller
Zipkin Whiting Co. LPA
23220 Chagrin Blvd.
Suite 106
Beachwood, OH 44122

Jonathan Foreman [sic]
Duvin, Cahn & Hutton
1301 East Ninth Street, 20th Floor
Cleveland, OH 44114

Re: 53 160 00469 03
Cari Butcher
and
Bally's Total Fitness

Dear Parties:

This will acknowledge receipt on July 3, 2003 of a Request for Arbitration dated July 1, 2003, either by joint submission or in accordance with provisions in a personnel manual or employment agreement. We

understand that a copy was sent to Respondent. A copy of our National Rules for the Resolution of Employment Disputes, as amended and in effect November 1, 2002, can be found on our web site at www.adr.org.

If you would like a printed copy of the applicable rules, please contact the undersigned.

Pursuant to Section 1 of the Rules, "If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these Rules, the arbitrator shall apply these Rules."

We ask the parties to refer to Sections 4 and 5. Pursuant to Section 4, the Respondent's answering statement is due on or before August 4, 2003. The answer should set forth a brief statement of the nature of the dispute and the issues to be presented. A copy should simultaneously be forwarded to the Claimant. If Respondent wishes to counterclaim, file the appropriate number of copies to the attention of the undersigned. A copy should be directly sent to Claimant.

We ask the parties to refer to Sections 4 and 5. Pursuant to Section 4, the Respondent's answering statement is due on or before [sic]. The answer should set forth a brief statement of the nature of the dispute and the issues to be presented. A copy should simultaneously be forwarded to the Claimant. If Respondent wishes to counterclaim, file the appropriate number of copies, together with the administrative

fee, to the attention of the undersigned. A copy should be directly sent to Claimant.

We note your claim has been filed as undetermined. Please be advised you will be required to specify an amount prior to the hearing.

The Claimant has requested that the hearing be held in Cleveland, Ohio. Please review the Rules regarding the locale of hearings.

In accordance with the Rules, enclosed is a roster of names of all arbitrators who are members of our regional Employment Dispute Resolution Roster. The parties are encouraged to agree to as many arbitrators from this roster as possible, and to advise the Association of their agreement within ten days from the date of this letter. Upon notification of the arbitrator selected by both parties, the AAA will appoint pursuant to the Rules.

In the event the parties are unable to agree to an arbitrator from the enclosed roster, the Association will provide the parties with a shorter list of arbitrators who are members of the regional Employment Dispute Resolution Roster. Each party shall have an opportunity to review the shorter list, strike any names objected to, number the remaining names in order of preference and return that list to the AAA. If the list of arbitrators is not returned by the date specified, the arbitrator will be appointed as authorized in the Rules.

Enclosed is a conflicts form to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The conflicts form is due within ten days from the date of this letter. The parties are to exchange copies of all correspondence except this form and arbitrator lists.

The Association will make maximum use of fax machines when communicating in writing, and request that the parties do the same. If you have not provided us with your fax number, we ask that you do so at this time. If a party does not provide us with their fax number, then that party will have to rely on receiving correspondence via regular mail.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA. Without the consent of the parties, case managers only have the authority to grant one extension per deadline, provided the request is reasonable and necessary. Untimely filings will not be considered by the Association.

The Association will require advance deposits once the arbitrator(s) is appointed. These deposits are calculated based on the number of days the parties have suggested will be necessary, in addition to the pre and post hearing time that the arbitrator(s) may charge pursuant to the arbitrator's resume.

Additionally, the parties may desire to mediate this case prior to an arbitration hearing. Mediation is a private, non-binding process under which the parties submit their dispute to a third-party neutral. The mediator may suggest ways of resolving the dispute, but may not impose a settlement on the parties; the parties attempt to negotiate their own settlement agreement. Please contact the undersigned for further details regarding mediation.

In closing we wish to remind the parties that AAA filing fees are nonrefundable. If the parties enter settlement negotiations at any time after the AAA has opened its file, they should take into consideration the nonrefundable filing fees and deposits that have been paid to the AAA. The AAA does not refund filing fees or neutral costs incurred when parties settle their dispute or withdraw their claims. We encourage parties to resolve their disputes as amicably as possible and this notice is just to alert you to this issue so that it doesn't become a concern in the future.

Please feel free to call if you have any questions. We look forward to assisting you in this matter.

Sincerely,

/s/ [Illegible]
John D. Rudolph
Case Manager
866 888 5294
rudolphj@adr.org

Andrea J. Dorsey
Supervisor
404 320 5117
Dorseya@adr.org
AJD/JODR:svb

Enclosures

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Renee Z. Greller
Zipkin Whiting Co. LPA
23220 Chagrin Blvd.
Suite 106
Beachwood, OH 44122

Jonathan Foreman
Duvin, Cahn & Hutton
1301 East Ninth Street, 20th Floor
Cleveland, OH 44114

Re: 53 160 00469 03
Cari Butcher
and
Bally's Total Fitness

CASE MANAGER: John D. Rudolph
DATE: July 24, 2003

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator(s) pursuant to the Rules, we must advise the arbitrator(s) of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list.

Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator(s), together with the filing papers.

NAME AFFILIATION ADDRESS

DATED: _____ PARTY: _____
Please Print

[LOGO] American Arbitration Association
Dispute Resolution Services Worldwide

The American Arbitration Association is pleased to introduce its Ohio, Indiana & Kentucky Employment ADR Roster of Neutrals.

The Ohio, Indiana & Kentucky Employment ADR Roster of Neutrals of the American Arbitration Association has been specifically selected for and trained in the resolution of employment disputes. The panel members have at least ten years experience dealing directly with employment disputes either as lawyers, judges, government agency officials or academics.

Keith A. Ashmus, Esq.
Frantz Ward LLP

Carrie Bell Washington
Attorney & Arbitrator

Marshall A. Bennett Jr., Esq.
Marshall & Melhorn, LLC

Michael L. Fortney, Esq.
Fortney & Klingshirn

Mitch Goldberg, Esq.
Attorney & Arbitrator

Donald L. Goldman, Esq.
Management Recruiters International, Inc.

Patricia Thomas Bittel, Esq.
Arbitrator & Mediator

Barton A. Bixenstine, Esq.
Ulmer & Berne, LLP

Barbara Bonar, Esq.
Law Offices of B. Dahlenburg Bonar, P.S.C.

David A. Brill, Esq.
Hillstreet Beds, LLC & Hillsdale House, Ltd.

Cary Cooper, Esq.
Cooper & Walinski

Samuel DeShazer, Esq
Hall, Render, Killian, Heath & Lyman

Sue Marie Douglas, Esq.
Duvan [sic], Cahn & Hutton

Monette Elaine Draper, Esq.
Attorney & Arbitrator

Hon. Robert M. Duncan, Esq
Ohio State University College of Law

Phyllis E. Florman, Esq.
Volz & Florman

Michael W. Hawkins, Esq.
Dinsmore & Shohl, LLP

Edwin S. Hopson, Esq.
Wyatt, Tarrant & Combs, LLP

Whayne M. Hougland, Esq.
Walther, Roark, Gay & Todd PLC

Ann Kenis, Esq.
Indiana University Northwest

Daniel N. Kosanovich, Esq.
Attorney, Arbitrator & Mediator

Howard Levy, Esq.
Benesch, Friedlander, Coplan & Aronoff, LLP

Susan L. Macey, Esq.
Attorney, Arbitrator & Mediator

Carl F. Muller, Esq.
Warren & Young P.L.L.

Susannah Muskovitz, Esq.
Faulkner, Muskovitz & Phillips, LLP

Cynthia Stanley, Esq.
Attorney, Arbitrator & Mediator

Robert G. Stein
Arbitrator & Mediator

Gregory P. Szuter, Esq.
Attorney, Arbitrator & Mediator

Floyd Weatherspoon, Esq.
Capital University Law School

Brenda Franklin Rodeheffer, Esq.
Monday, Rodeheffer, Jones & Albright

Virginia Conlan Whitman, Esq.
Attorney

For more in formation [sic] about our rules or panel members, please contact:

Southeast Case Management Center
(800)925-0155

APPENDIX M

AUGUST 11, 2003 LETTER ACCEPTING ARBITRATOR

LAW OFFICES OF
DUVIN, CAHN & HUTTON
LEGAL PROFESSIONAL ASSOCIATION

BARRY Y. FREEMAN
BFREEMAN@DUVIN.COM

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26711 NORTHWESTERN
HIGHWAY
SUITE 200
SOUTHFIELD, MICHIGAN
48034
248/945-1977
FACSIMILE: 248/945-1162

August 11, 2003

Via Fax Transmission (404/325-8034)
and Regular U.S. Mail

John D. Rudolph
Case Manager
American Arbitration Association
2200 Century Parkway, Suite 300
Atlanta, Georgia 30345

RE: In the Matter of Cari Butcher v. Bally Total Fitness Corporation
AAA Case No. 53 160 00469 03

Dear Mr. Rudolph:

Pursuant to Rule 4(b)(ii) of the American Arbitration Association's National Rules for the Resolution of Employment Disputes, here are the original and one copy of *Bally Total Fitness Corporation's Answer to Demand for Arbitration by Cari Butcher*. In addition, we respectfully request that the arbitration take place at our office. Finally, the parties have agreed to select Robert G. Stein as the arbitrator for this matter.

Very truly yours,

/s/ Barry Y. Freeman
Barry Y. Freeman

Enclosures

cc: Renee Z. Greller, Esq. (w/encl.)
Bally Total Fitness Corporation (w/encl.)
Robert P. Duvin, Esq. (w/encl.)
Jonathan S. Forman, Esq. (w/encl.)

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